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**THE WAR POWERS RESOLUTION: IS IT TIME FOR A NEW  
APPROACH?**

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## **ABSTRACT**

**TITLE:** The War Powers Resolution: Is It Time For A New Approach?

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The 1973 War Powers Resolution's purpose was to ensure Congress shared responsibility and accountability with the President in determining when to use the United States Armed Forces in hostilities. Unfortunately, the Resolution has not fulfilled the expectations of its sponsors and has served to divide American public opinion whenever a President has contemplated employing military forces in a crisis situation. Undermining the War Powers Resolution are the debates on whether the Resolution improperly intrudes on the President's constitutional Commander-in-Chief powers and what constitutes proper consultation, and the constitutionality of the presidential reporting requirements and the mechanisms by which Congress can react to presidential initiatives. Presidents have not embraced the War Powers Resolution and Congress has failed to consistently demand Presidential compliance with its provisions. Congress and the President must devise a new legislative compact that provides a framework for legislative and executive action in crisis situations. This compact would permit the President to act in specific instances without prior Congressional approval, establish a formal consultation mechanism between the President and Congress both before and during a crisis, establish reporting requirements as a means to inform Congress, and require Congressional action to either support or request termination of the military action as soon as practicable.

## **BIOGRAPHICAL SKETCH**

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## INTRODUCTION

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

Thomas Jefferson to James Madison<sup>1</sup>

Believing that it needed to "recapture not only the spirit but the clear intent of the constitutional framers to have the Congress share responsibility and accountability with the President" in executing foreign policy particularly in introducing United States Armed Forces into hostilities, Congress passed the War Powers Resolution in 1973.<sup>2</sup> Unfortunately, the Resolution has not lived up to its sponsors' expectations. Although the Congress has viewed the Resolution as an affirmation of its constitutional war powers, it has usually been unwilling and unable to prevent Presidents from unilaterally making and then executing decisions to use the Armed Forces abroad. President Clinton's recent actions in Haiti highlight this point; despite broad congressional opposition, he initiated a military operation in September 1994 to overthrow Haiti's military junta and later deployed troops to oversee the re-establishment of the government of President Jean-Bertrand Aristide.<sup>3</sup> Congress has further undermined the War Powers Resolution by often debating a President's actions but rarely taking legislative action to obtain presidential compliance with the Resolution's provisions.<sup>4</sup> The Resolution's apparent failure to be an effective mechanism for ensuring a collective agreement on the need to introduce the Armed Forces into hostilities leads one to question if a better mechanism can be created for ensuring that each decision to dispatch the Armed Forces abroad does not become a clash between the President and Congress over rights and power. This paper will review the constitutional framework and key provisions of the War Powers

Resolution, discuss the major sources of controversy concerning the Resolution, and highlight the resulting record of presidential compliance. Next, it will discuss how Congress has contributed to undermining the Resolution's impact and implementation. Finally, this paper will present a suggested legislative framework to direct presidential and congressional action when deploying and employing the United States Armed Forces abroad.

## **THE WAR POWERS RESOLUTION: CONTEXT AND OVERVIEW**

The roots of the War Powers Resolution may be found in Congress' reaction to the long and divisive Vietnam War; if the United States had won that war, the War Powers Resolution may never have come into being. Following World War II, the executive and legislative branches had a common desire to contain the spread of communism. Although Congress often voiced objections to unilateral Presidential decisions such as when President Truman decided to respond militarily in the Korean War and deploy additional Army divisions to Europe, it normally supported the Presidents' actions because of its perception of the threat to the United States' security interests. Presidential initiative also characterized the initial American actions in Vietnam. Although President Johnson had called upon Congress to pass the Gulf of Tonkin Resolution, he made most of the decisions on the extent and nature of the American commitment. Congress initially supported the President, however, the subsequent failure to win the war in Vietnam served to destroy the overall foreign policy consensus that had existed between the two branches. Chastened by the divisiveness of the Vietnam War and retroactively disillusioned with the decision process that had led to the United States' deep involvement



in the war, "Congress turned its attention to reassuring the public that no future president would be permitted to drag the nation into an unpopular foreign war against the will of Congress."<sup>5</sup> It intended the War Powers Resolution to restore what it perceived to be the proper balance of executive and legislative power.

The authors of the War Powers Resolution presented several reasons for advocating this legislation. First, they asserted that the Constitution specifically allocated to Congress the sole right to declare war. Although they recognized the President's constitutional power as Commander-in-Chief, the Resolution's authors contended that the modern presidential practice of committing troops into hostilities without Congress' specific legislative authorization had upset the balance of the Constitution.<sup>6</sup> Second, they considered the initial decision to commit troops perhaps the most important decision that will occur in a conflict. If the decision was not well conceived, it might result in a national disaster. By forcing the President to be accountable to Congress to justify and explain his actions, the Resolution would ensure the first decision to commit troops would be sound, that it could be logically explained, and that it would reinforce congressional support and responsibility for the operation.<sup>7</sup> Finally, the authors realized that once troops began deploying, Congress' ability to reverse the situation became very limited; it could only use its constitutional powers of the purse and impeachment. Congressional use of either power presented difficulties and opened Congress up to charges of increasing the risks faced by the deploying armed forces.<sup>8</sup>

Congress overrode President Nixon's veto of the War Powers Resolution on November 7, 1973. The text of the new public law stated that its purpose was to "fulfill the intent of the framers of the Constitution of the United States and ensure the collective

judgment of both the Congress and the President will apply to the introduction” and continued use of United States Armed Forces in hostilities or situations where hostilities were imminent.<sup>9</sup> The Resolution states that the President may only use his constitutional powers as Commander-in-Chief to introduce troops into situations where hostilities were imminent “pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories, or its armed forces.” Section 3 of the Resolution directs the President to consult with Congress in every possible instance before introducing military forces into hostilities or situations where “imminent involvement in hostilities are clearly indicated by the circumstances” and regularly until forces are either no longer engaged or removed. Section 4 requires the President to report to Congress within 48 hours if United States Armed Forces are introduced into hostilities or a situation with the potential for imminent hostilities; “into the territory, airspace, or waters of a foreign nation, while equipped for combat...;” or if substantially increasing a force already located in a foreign nation. Section 5 requires the President to terminate the use of the forces within 60 days of the date he submitted or was required to submit the report concerning his use of the military unless Congress has declared war, enacted specific authorization for the use of the forces, extended the authorized period, or is unable to meet (the Resolution authorizes the President an additional 30 days to withdraw the military forces if he determines it to be an unavoidable military necessity). This section also permits Congress to direct the removal of forces by concurrent resolution. President Nixon asserted that both this provision and the one providing for an automatic time limit on troop deployment unless Congress approved an extension were unconstitutional.<sup>10</sup> Not only have these two provisions sparked

controversy over the years, but critics have also condemned the provisions for consultation, reporting, determination of what constitutes hostilities and mandated withdrawal in the event of Congressional inaction. Scholars have even debated whether the War Powers Resolution effectively restores the proper balance of power envisioned by the framers of the Constitution.

### **CONSTITUTIONAL FRAMEWORK**

The logical place to begin in a discussion of the validity of the War Powers Resolution is to determine what constitutes the extent of the war powers allocated to each branch by the Constitution. The framers of the Constitution skillfully blended their experiences under the Articles of Confederation, historical British parliamentary practice, and published political theory into a document that provided for equal yet distinct branches of government. Supporters of strong Presidential power contend that, despite the extensive list of enumerated constitutional powers given to Congress and the few given to the President, the Constitution actually restricts congressional power and defines executive power expansively. Article I of the Constitution, they say, limits the Congress to "all legislative powers herein granted."<sup>11</sup> On the other hand, the Constitution declares "The executive Power shall be vested in a President of the United States of America." There are no limiting words constraining this power—the President's executive power is "subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."<sup>12</sup> The argument for strong Presidential power continues that, while the legislature can raise armies and navies and can alone declare war and "transfer the nation from a state of peace to a state of hostility, it belongs to the 'executive power' to do

whatever else the law of nations, cooperating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers.”<sup>13</sup> Conveniently overlooked in this argument is that, while the President may be best suited institutionally to take the initiative in the conduct of foreign affairs, without legislative sanction his powers can lose their moral force. The Constitution’s distribution of powers “requires agreement between the President and Congress in order to make most significant national security policy decisions.”<sup>14</sup> Justice Jackson wrote in his opinion on the Steel Seizure case of 1952 that presidential power is greatest when he acts pursuant to congressional authorization and least when he acts in a manner incompatible with the will of Congress.<sup>15</sup> The premise behind the War Powers Resolution is that Congress must authorize the use of the Armed Forces abroad and that the President who employs the Armed Forces contrary to congressional will is acting improperly. The support for this contention comes from Congress’ enumerated powers.

The Constitution assigns Congress several enumerated powers. Article I, section 8 of the Constitution gives Congress the power to lay and collect taxes, to “provide for the common Defense,” and “to declare War [and] grant Letters of Marque and Reprisal.” It also grants Congress the power to “raise and support armies,...to provide and maintain a Navy, to make Rules for the Government and Regulation of the land and naval Forces, to provide for calling forth the Militia...[and] to provide for organizing, arming, and disciplining, the Militia.” Finally, Congress received the power “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

The framers of the Constitution wanted Congress to be responsible for determining when this nation should go to war. James Madison wrote, "Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, *whether a war ought to be commenced, continued or concluded.*"<sup>16</sup> The delegates specifically used the words "declare war" versus "make war" because they realized and wanted to ensure that the President had the legal capability to direct the Armed Forces in repelling enemy attacks on the United States. Although the Constitution's framers gave Congress the power to formally declare war, they knew that formal declarations of war were neither required by international convention nor customarily used.<sup>17</sup> Alexander Hamilton in *Federalist* No. 25 cited the disuse of declarations for war as a reason for maintaining a standing army.

Congress has not used its power to declare war often; it has only declared war in five instances in the last two centuries, yet there have been more than 200 times since 1789 when the United States Armed Forces were engaged in military action overseas.<sup>18</sup> There have been situations, though, where Congress authorized hostilities without a declaration of war. Beginning as early as the Quasi-War with France in 1798-1800, Congress passed a series of bills at the request of President Adams which effectively put the country on a war footing. The Supreme Court upheld these actions in rulings in 1800 and 1801 by ruling that Congress had the constitutional authority to authorize hostilities by either a formal declaration of war or by passing statutes that authorized an undeclared war. In *Bas v. Tingy*, the Court held that military conflicts could be 'limited,' 'partial,' and 'imperfect,' without requiring Congress to make a formal declaration."<sup>19</sup> In *Talbot v. Seeman* Chief Justice Marshall wrote that the Constitution vested in Congress the whole powers of war. Thus, the framer's intent during debates on the war clause and these

Supreme Court decisions both seem to support Congress' assertion that its power to declare war should extend to all levels of potential conflict and that its sanction is required prior to any Presidential action except for immediate defense against attack. Yet, even though Congress provided some form of legislative sanction by either enacting resolutions supporting military actions or appropriating funds to support those operations on sixty-two occasions since 1789, Presidents unilaterally initiated 140 military operations.<sup>20</sup> Presidents have justified these operations by contending that they have an independent constitutional right as Commander-in-Chief to determine when to employ the armed forces.

Concerned about the potential for abuse by placing too much power in the executive's hands, the framers wanted to create a strong legislative branch. At the same time, they also feared the possible tyranny posed by an all powerful legislature.<sup>21</sup> They remembered the existing problems under the Articles of Confederation when the legislative branch conducted the executive functions. The framers' solution to the dilemma was to balance power between branches by allocating individual powers and responsibilities to the branch best suited for using them. They designed Congress to be a deliberative body whose decisions would reflect the American public's attitudes and opinions. Alexander Hamilton explained in *Federalist* No. 70: "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarring of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority."<sup>22</sup> While Congress became the deliberative body, the President became the executor of laws and policy. Hamilton contended that the

executive's primary qualification must be energy. The strengths of the executive are that it brings "decision, activity, secrecy, and dispatch" to the national security process.<sup>23</sup>

Article II specifies that "the executive Power shall be vested in a President." Section 2 of Article II declares "the President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties...[and] shall appoint Ambassadors." He "shall receive Ambassadors and other public Ministers." Finally, he "shall take Care that the Laws be faithfully executed." The framers made the President the Commander-in-Chief because they realized, as Hamilton writes in *Federalist* No. 74, "The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority."<sup>24</sup> Congress raises and maintains the armed forces, but it is the President whom the Constitution entrusts with using them in war and in peacetime. One Constitutional scholar asserts that even in peacetime the "President has independent power under the Constitution to employ military or naval forces of the United States at home or abroad except as restricted by international law."<sup>25</sup>

The framers, by giving Congress the power to "declare" rather than "make" war, wanted to ensure the President had the ability as the Commander-in-Chief to direct the military forces in defending against attack. Although the framers were primarily thinking about attacks on the United States, Presidents have from the early days of the nation used the right of self defense more often to counter attacks on United States military forces. For example, in 1807 a British vessel fired on the American ship, *Chesapeake*. Congress

was out of session so Jefferson prepared to respond by ordering military purchases. He justified his actions by claiming that the laws of necessity and self-preservation were more important than written law. He summarized "to lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."<sup>26</sup> Since passage of the War Powers Resolution, Presidents have claimed self defense as reason for using military force in at least six incidents in the Gulf of Sidra and Persian Gulf (Arabian Sea).<sup>27</sup>

There is no question that a President has the right under the War Powers Resolution to defend the United States against attack. There is controversy, however, whether the Resolution permits two customary presidential uses of the armed forces (protection and rescue American citizens and enforcement of and response to treaty requirements) without prior Congressional approval. The first, the responsibility for protecting and rescuing American citizens, has been a customary Presidential responsibility from the earliest days of the nation. Jefferson advised Congress in 1804 that he had ordered troops "to protect our citizens from violence...and, when necessary, to repel an inroad, *or to rescue a citizen or his property*, but by contrast, await congressional approval for 'offensive action.'"<sup>28</sup> In the 1800s, most military action directed by Presidents was to rescue or protect citizens from bandits, pirates, or Native Americans. These actions normally posed little risk of escalating into a general war, and Presidents usually justified them as protective, the opponents disorganized and nonsovereign, and that the military actions were in accordance with statutory authority or international law. Congress usually acquiesced in these presidential initiatives.<sup>29</sup> So common did military rescue and



protection of citizens become that a justice writing in the case *Durand v. Hollins* gave the President the discretion to take action abroad to protect the lives or property of the citizen.<sup>30</sup> In 1868 Congress enacted what has been called the "Hostage Act," that authorized and required the President to "'use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release' of American citizens 'unjustly deprived of ...[their] liberty by or under the authority of any foreign government...'"<sup>31</sup> The act, which still exists, did not permit the President to take reprisals or commit "acts of war." A 1967 State Department study listed 69 occasions between 1789 and 1967 where military forces made landings to protect citizens.<sup>32</sup> Since passage of the War Powers Resolution, Presidents have used military forces to rescue American citizens on at least eight occasions.

The second controversial customary Presidential power in conflict with the War Powers Resolution is the President's use of the Armed Forces in fulfilling treaty requirements to defend United States' allies and in responding to United Nation's resolutions. In the aftermath of World War II, the United States found itself accepting global security responsibilities. The United States became party to several mutual security pacts beginning with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty). The common thread to most of these treaties is a clause, similar to the one in the Rio Treaty, that declared "an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack."<sup>33</sup> Unlike the Rio Treaty, later mutual security treaties restricted that commitment by permitting individual countries to respond in accordance with their "constitutional processes."<sup>34</sup> Presidents

have used these treaties to defend their military actions. President Johnson used the Southeast Asia Treaty Organization (SEATO) treaty to help justify the buildup in Vietnam. Presidents have also used United Nations Security Council resolutions to justify using the Armed Forces. The original founders of the United Nations stipulated in Article 43 of the United Nations Charter that member countries would provide and subordinate military forces to the United Nations for its use to "combat acts of aggression which threatened the international community as a whole."<sup>35</sup> In the implementing legislation, the United Nations Participation Act, Congress authorized the President in Section 7 to negotiate special agreements with the Security Council committing United States forces for use under Articles 42 and 43 of the United Nations Charter. These agreements would be subject to legislative approval of Congress. Once Congress approved the agreements, further congressional authorization would be unnecessary in the event the United Nations Security Council decided to use these forces.<sup>36</sup> Although no special agreements were ever negotiated by the President and the Security Council and approved by Congress, Presidents have cited United Nations' authority for actions in Korea, Persian Gulf (Iraq), Somalia, and Haiti to justify their use of military forces.<sup>37</sup>

In summary, customary presidential uses of the Armed Forces to fulfill treaty requirements and protect American citizens conflict with the War Powers Resolution's attempt to restore a strict interpretation of the Constitution's allocation of war powers. The problem with a strict interpretation is that while the Constitution specifies that Congress has the power to declare war, it lets each branch share in the determining and conducting foreign policy. "The latter power includes the former and may, at times, greatly influence the likelihood of the beginning of the war."<sup>38</sup> Furthermore, the

Constitution does not clearly prescribe the limits to a President when he uses his powers as Commander-in-Chief when he conducts foreign policy. Assistant Attorney General William Rehnquist asserted during the debate on the War Powers Resolution that Presidents throughout U.S. history had used their authority as Commander in Chief of the Armed Forces to commit forces to defense against enemy attack, deploy forces to fulfill treaty obligations and protect American interests and conduct armed conflict once it is instituted. He argued that Congress had either acquiesced in these uses of military power without formal ratification, ratified the action, or taken no action at all. Although he noted that Congress may in some situations impose restrictions on the President's power as Commander in Chief, not every restriction "would be free of constitutional doubt."<sup>39</sup> Despite the restrictions contained in the War Powers Resolution, Presidents have continued to use the Armed Forces in the manner Rehnquist described.

### ***KEY ISSUE I: CONSULTATION***

Not only has there been debate on whether the War Powers Resolution restores a constitutional balance of power between the branches, but also the Resolution's individual provisions have been a source of controversy. The first of these is the Resolution's requirement for the President to consult with Congress. A primary purpose of the War Powers Resolution was to ensure that the President and the Congress came to a collective decision over the advisability of introducing troops into a potentially hostile situation. Although Section 3 does not explicitly define consultation, Congress' intent, expressed in its report on the War Powers Resolution, was the President would ask for its advice and opinions, and when appropriate, approval of the course of action.<sup>40</sup>

Consultation did not have to involve the entire Congress, rather the situation and time frame available would determine whom the President chose to consult. The Constitution already requires consultation between the President and Congress on certain foreign policy actions. When granting the President the ability to make treaties and appoint ambassadors, the framers made these powers subject to "the advice and consent of the Senate." The word "advice" in their time was a technical term that described "close and continuous consultation that was expected to go on, usually face to face, between a ruler and a council of state or privy council."<sup>41</sup> Hence, if the framers intended that the President consult with Congress in these two significant foreign affairs actions, the Resolution's authors had reasonable cause to expect that the President would seek Congress' advice and opinions when he was planning to exercise his Commander-in-Chief powers in situations with significant foreign policy implications. Since the end of World War II, however, the record of presidential consultation with Congress is spotty. Truman failed to consult with Congress prior to deploying troops to Korea. Eisenhower consulted with Congress in determining what action to take in Vietnam, the Middle East and Formosa yet rarely consulted with it when directing covert actions. Johnson simply notified Congress of his planned actions in the Dominican Republic. Despite this record, the consultation requirement was not a major point of contention during the debate over the War Powers Resolution. Although President Nixon cited several sections in his veto message he considered to be unconstitutional, he suggested that the consultation requirement would "foster this process [of legislative-executive cooperation] by enhancing the flow of information from the executive branch to Congress.... This provision is consistent with the desire of this Administration for regularized consultations

with the Congress in an even wider range of circumstances.”<sup>42</sup> Unfortunately, the adversarial relationship between the branches that manifested itself in the veto override continued to undermine this provision even after President Nixon left office. Since the legislation did not specifically define whom in Congress the President should consult with, there have been disagreements on whether Presidents have “consulted” with the appropriate people. Also, with few exceptions, Presidents have elected to inform those members they did contact of actions they were taking without first seeking advice or recommendations on a course of action.

## ***KEY ISSUE II: REPORTING***

As was in the case of consultation, there was relatively little controversy over the concept of reporting during the congressional debate on the War Powers Resolution. Section 4 directs the President, in the absence of a declaration of war, to report to Congress whenever he orders Armed Forces into certain situations. Yet, as happened with consultation, practice has not matched the Resolution’s intent; none of the 31 reports submitted since the passage of the War Powers Resolution have been made under the reporting provision (most reports “take note” of the Resolution rather than cite the Resolution as the requirement for the report). There are several reasons why the reporting requirement has become controversial. First, the Resolution directs that the President provide “the circumstances necessitating the introduction of United States Armed Forces, the constitutional or legislative authority under which such introduction took place;” “the estimated scope and duration of the hostilities or involvement” and any other information Congress requests. Although the provision appears reasonable and

Presidents have largely provided this information, critics allege that in today's partisan environment, Congress makes the President's estimates of engagement and scope of hostilities a strict framework that will constrain and prevent the President's ability to respond to new situations.<sup>43</sup> Second, the Resolution requires the President to report when introducing forces into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." This statement raises the issue on what is the meaning of the term "hostilities." The House report on the Resolution indicated that "hostilities" would involve a state where "no shots had been fired but where there is a clear and present danger of armed conflict."<sup>44</sup> This definition, in effect, compels the President to report to Congress any time he deploys forces if there is even the slightest potential for any terrorist or any other action that could lead to armed conflict. There have been, however, at least 17 military actions falling within the congressional definition of hostilities when Presidents have not submitted reports to Congress.<sup>45</sup> Finally, the reporting requirement's ambiguity may also encourage terrorist or guerrilla action whose purpose would be to generate conflict between the President and Congress and result in implementation of the Resolution. This latter point is important because the reporting provision is closely linked to one of the most controversial provisions of the War Powers Resolution in that the President's report starts a time clock for requiring withdrawal of the Armed Forces unless Congress gives its legislative approval.

### ***KEY ISSUE III: CONGRESSIONAL ACTION***

This section is the most controversial part of the War Powers Resolution primarily due to three provisions that provide the "enforcement" mechanism of the act. President Nixon cited the first provision in his veto message—the President must terminate the use of the United States Armed Forces within 60 days unless Congress has declared war or passed legislation authorizing their use. Although the President may extend the Armed Forces' deployment for another 30 days if he certifies unavoidable military necessity respecting their safety, this preannounced time limit for military involvement puts the deployed forces in an extremely vulnerable position by giving the opposing forces the opportunity either to wait out United States military presence, take action against the withdrawing forces when they are vulnerable, or attack the American forces in a move designed to influence American public will. Former Commandant of the Marine Corps P.X. Kelley asserts this is what led to the 1983 bombing of the Marine Barracks in Lebanon. Though he had warned against setting time limits during his testimony, the length of the deployment and the potential for casualties were the major considerations during the Congressional debate over deploying the Marines into Lebanon. Two weeks after Congress narrowly approved the operation, intelligence intercepted a message between two Moslem militia units proposing that "If we kill 15 Marines, the rest will leave."<sup>46</sup> Less than a month after the vote, 241 Marines died at the hands of a terrorist. The Resolution's predetermination of the length of time a President may employ troops without Congressional concurrence also appears to conflict with the President's constitutional authority as Commander-in-Chief. In 1866, Supreme Court Chief Justice Chase wrote that Congress could pass laws to provide for war "except such as interferes

with the command of forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.”<sup>47</sup>

Embedded in the restriction that presidential use of the Armed Forces is limited to a 60 day limit unless Congress approves is the unwritten provision that should Congress fail to act, the President still must withdraw the forces. Normally this situation should be the exception rather than the rule. One of the purposes of the resolution was to force Congress to confront issues directly and be accountable for its decisions. To achieve this end, Congress wrote into the Resolution procedures for expediting the passage of any joint or concurrent resolution to ensure passage of legislation prior to the expiration of the sixty-day period. There still remains the strong possibility and precedent that Congress will fail to act in a timely manner. On April 10, 1975, President Ford asked Congress for authority to carry out evacuations of American citizens in Vietnam. Due to the urgency of the situation, he asked that legislative action be completed by 19 April. Congress had still not agreed on legislation when President Ford eventually ordered the evacuations at the end of April.<sup>48</sup>

Congress itself was divided on whether to incorporate a silent veto mechanism. Congressman Frelinghuysen observed the paradox in the silent veto mechanism by noting that Congress’ aim in the Resolution was to participate, take responsibility, and reassert Congress’ role. He added, “Then we say if we cannot make up our minds in 60 days about whether we should engage in hostilities or not, that we are going to assume that the President is wrong.”<sup>49</sup> Congressional failure to act in 1975 was precisely the sort of situation that Ford had feared when as House Republican Leader he argued against forcing withdrawal even in the event of Congressional inaction. He declared that



members of Congress "should have the guts and the will to stand up and vote 'against the commitment of forces abroad' instead of saying 'you cannot do it' by doing nothing."<sup>50</sup> Ironically, as controversial as the silent veto mechanism has been, there has been even more controversy about the type of resolution Congress chose to use in the War Powers Resolution to oppose a President's use of the Armed Forces.

Probably the Resolution's most contentious provision permits Congress to direct by concurrent resolution withdrawal of military forces. This was the second reason President Nixon cited for vetoing the Resolution. Congress commonly uses concurrent resolutions to retain legislative control over powers it delegates to executive agencies.<sup>51</sup> Proponents of the War Powers Resolution claim that the concurrent resolution is a valid means of overriding unauthorized Presidential use of military force since Congress alone has the constitutional power to declare war.<sup>52</sup> Critics argue that the concurrent veto violates the presentment clause of the Constitution (Article I, Section 7) which requires that every bill that passes Congress shall be presented to the President for either approval or veto prior to becoming law. The Supreme Court supported this latter opinion in *Immigration and Naturalization Service v. Chadha*. A second argument against permitting the use of the concurrent resolution is that "if the President has the power to put men there in the first place, that power cannot be taken away by concurrent resolution because the power is constitutional in nature."<sup>53</sup> In order to overcome objections to the concurrent resolution clause, Congress, in 1983, passed a law that provided expedited procedures for any joint resolution directing the removal of United States Armed Forces engaged in hostilities outside the United States without statutory authorization or a declaration of war.<sup>54</sup>

## WAR POWERS RESOLUTION IN PRACTICE

Congress did not intend the War Powers Resolution to be a device for depriving the President of his ability to deal with foreign policy crises; It hoped the Resolution would encourage dialogue between the President and Congress on the critical issue of whether the nation should go to war. Senator Jacob Javits, the legislation's principal sponsor in the Senate, had hoped that the law would "represent a compact between Congress and the President for making the Constitution work in what is generally admitted to be a gray area."<sup>55</sup> President Nixon's veto and the subsequent Congressional override of that veto undercut his hopes for a compact. Even though Presidents have the responsibility under the Constitution to "take Care that the Laws be faithfully executed," their unwillingness to fully comply with all the provisions of the Resolution, and Congress' unwillingness to enforce presidential compliance, have further undermined the Resolution's effectiveness. The Resolution's restrictions do not appear to have prevented any President from taking actions he felt necessary nor have Presidents fully adhered to the Resolution's requirements. They have normally informed rather than consulted Congress. Presidents have also provided reports consistent with rather than in accordance with the Resolution's reporting requirements in order to avoid starting the withdrawal clock.

While Presidents have not strictly adhered to the various requirements of the War Power Resolution, Congress has been extremely inconsistent in reacting to presidential use of force even in situations that were very similar. Congress will ignore the War Powers Resolution when the President uses the Armed Forces in some situations and in others it will attempt to enforce his compliance with its provisions. One of the most

striking examples of this phenomenon was Congress's different reactions to President Ford's actions in the *Mayaguez* rescue and President Carter's Iranian hostage rescue attempt. Both cases were military operations designed to rescue American citizens held captive. In neither case did the President effectively consult with Congress prior to initiating military action. In exceeding the limitations of the War Powers Resolution, President Ford also violated statutory prohibitions against using appropriated funds to send military forces into hostilities in Cambodia. Yet, the Senate Foreign Relations Committee unanimously praised President Ford's actions and denounced President Carter for violating the War Powers Resolution. Although the relative success of each operation is a major reason for the difference in congressional response, another equally important reason was that public opinion favored the first and was critical of the latter.<sup>56</sup>

Public opinion has had a tremendous influence on how Congress has reacted to presidential use of the Armed Forces in hostilities abroad. This is normal because the role of Congress under the Constitution is to represent the American people. Congressional reaction to Operation Urgent Fury in Grenada graphically demonstrates the effect of changing public opinion on congressional attitudes. Initially the reaction of many in the public and thus Congress was hostile. Speaker of the House Tip O'Neill publicly denounced the operation as "gunboat diplomacy." Once the public saw the returning medical students praising President Reagan for his actions, public opinion changed to strong support for the operation. Mr. O'Neill and other Member of Congress quickly changed their public pronouncements.<sup>57</sup> The problem that ensues when congressional opinion changes as a direct response to rapidly changing public opinion is that it makes the Congress an unreliable partner in making, along with the President, a collective

judgment on whether to introduce the Armed Forces into hostilities, particularly if the situation is controversial. This undermines the whole reason for the War Powers Resolution.

Congress appears to use the War Powers Resolution as an insurance policy. Normally, whenever the President has deployed troops abroad, Congress has demanded that he "obey the law" and come to them for support. If he does not and the mission fails, Congress can then claim the President "broke the law." If the President succeeds, Congress can tell the public they were "behind the president on the merits from the beginning (surely they can't be criticized for demanding compliance with the 'law') and march proudly in the victory parades."<sup>58</sup> The result of this behavior is that, instead of the two branches of government working together as equals, the President takes the risks and Congress takes the credit. One observer of events in Lebanon in 1982 noted:

Once the President steps out, the dangers can be gauged. Then, and only then, will Congress make up its mind. That is how it thinks a partnership in foreign policy ought to operate—with maximum risk to the President, and maximum opportunity for the legislators. Some partnership. Some foreign policy.<sup>59</sup>

Coupled with Congress' failure to take a consistent stand on the application of the War Powers Resolution is its failure to discharge its responsibilities when the President asks for legislative support or when the situation is such that it has the opportunity to take proactive rather than reactive action. There have been situations where the President acted before Congress would have even had the opportunity to debate an issue such as in the *Mayaguez* crew rescue; evacuation of citizens from Lebanon, Liberia, and Sierra

Leone; or the United States assistance to the Philippines during the attempted coup. But there have been other times when Congress failed to quickly take decisive action in support of or in opposition to the President when it was confronted with a situation in which the War Powers Resolution was applicable. Two examples illustrate this point. The first, previously mentioned, was Congress' failure in 1975 to provide legislation in the required time to permit President Ford to evacuate citizens from South Vietnam. This lack of decisive action disappointed Congressmen who had hoped that the War Powers Resolution would usher in a new role for Congress. Senator Eagleton remarked that Congress' failure to take action "raised serious questions about its willingness to fulfill its constitutional responsibilities."<sup>60</sup> The situation was not much different in the case of Haiti. Following the failure of the Governors Island agreement and the failure of the USS *Harlan County* to dock in Port-au-Prince in October 1993, the Senate rejected an attempt to prohibit defense appropriations from being spent on an invasion of Haiti unless necessary to rescue U.S. citizens. It did approve a sense of the Senate amendment stating that all military activities in Haiti should have prior congressional approval. Even after the U.N. Security Council authorized the use force against Haiti, the Senate failed to pass an amendment requiring the President to get congressional approval before invading Haiti. Even as preparations for the military invasion began, Congress failed to decisively act. Congress finally approved a resolution more than two weeks after troops deployed to Haiti that neither approved nor disapproved of the military action. When Congress fails to take proactive action such as in Haiti, it leaves itself in the situation that it created the War Powers Resolution to prevent. Congress' failure to act also calls into question whether it is willing to fulfill the intent of the framers of the Constitution in making the

hard decisions of war and peace. Once the President employs the United States Armed Forces into a hostile situation, Congress has very few alternatives other than to support the President, and none of them may be palatable. It may acquiesce as it did in Haiti by neither authorizing or condemning the invasion. It may approve the operation but in the process set limits such as in the length of the deployment as it attempted to do in Lebanon. It may elect to use its power of the purse to cut off funding as it did in Southeast Asia. Or it may elect to use its power of impeachment as was discussed by some in Congress following the aborted Iran hostage rescue. In every case except for the first, Congress risks the possibility of a constitutional battle with the President over war powers.

## **IS THERE A BETTER WAY?**

The history of the War Powers Resolution has been one of continued debates over its applicability, effectiveness, and constitutionality. Presidents have failed to effectively consult with Congress and strictly comply with the Resolution's reporting requirements. Congress has trumpeted the Presidents' failures to follow the Resolution but has never seriously attempted to live up to its responsibilities under the Resolution, bring its disagreements with the executive branch to the courts for final resolution, or rewrite the Resolution to make it a more viable law. Despite supporters' claims that the Resolution is a symbol that has at least minimally restrained the President, it appears more likely that the Presidents have not felt constrained by the Resolution but observed certain aspects of the Resolution solely in an effort to appease Congress. The War Powers Resolution has not fulfilled Congress's intent and has not served as a valid means to achieve consensus

on whether to take action abroad. Amendments by themselves cannot overcome the Resolution's unfavorable reputation—it should be repealed.

Repealing of the War Powers Resolution does not mean that there should not be a method for consultation and cooperation between the branches in deciding whether to deploy the Armed Forces or commit them to hostilities abroad. On the contrary, the framers of the Constitution realized that both branches needed to work together in order for there to be an effective and unified foreign policy. The Constitution gives the President the power to manage foreign affairs. He must realize, however, that Congress often has to take action to support his foreign policy decisions because an “effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all.”<sup>61</sup> Should Congress disagree with the President, it has the capacity through the legislative process to delay legislation, change the intent and substance of a foreign policy decision through amendments, or undermine the president's position in the foreign policy arena. To achieve a coordinated and bipartisan foreign policy, the President and Congress should strive to work together in discussing and coordinating foreign policy objectives. Senator Vandenberg viewed the proper relationship in this way. “This [bipartisanship] does not mean that we cannot have earnest, honest, even vehement domestic differences of opinion on foreign policy....We should ever strive to hammer out a permanent American foreign policy, in basic essentials, which serves all America.”<sup>62</sup> The desired effect of regular discussion and consultation will be consensus on the broad outlines of foreign policy and a mutually agreed upon idea of what actions will be in support of the national interest. When the President and Congress develop a consensus on a course of action,

the President is able to act on the international stage knowing that he has the support of Congress and, by extension, the American people behind him. The final benefit of this process will be that when exigencies arise, the President and Congress will have most likely already discussed how the United States should react.

Since no one can predict every eventuality that may arise, there must be some sort of formal structure to guide action when world events require United States Armed Forces involvement. Although an informal agreement between the two branches of government would be the easiest to negotiate, such a device would require as a minimum a tacit reaffirmation as Presidents changed. Congress should pass and the President should sign a resolution to guide presidential and congressional actions when events require the deployment or commitment of United States Armed Forces to a conflict abroad. This resolution would clearly define the positions and responsibilities of each branch of government.

The first provision of this resolution should state as unambiguously as possible the resolution's purpose. The resolution's purpose is to provide a framework for executive and legislative action when introducing United States Armed Forces into the territory, airspace or waters of a foreign nation for purposes other than for deployments which relate solely to supply, replacement, repair, or training of such forces. The procedures would apply whenever the United States Armed Forces would be committed into a situation which may be construed as an act of war, where there is a reasonable potential for engaging the organized armed forces of another country, or that the presence of the Armed Forces will make them subject of terrorist action. These requirements deliberately give the resolution broad applicability. Whenever the President deploys troops for other



than daily operations and training in an effort to achieve a specific foreign policy outcome, he is making a significant foreign policy decision. The Congress, as a coequal branch of government, has a right to be informed of this action and a responsibility to take appropriate action as required by their constitutional position.

The next provision in this resolution would be to define those situations in which the President would be authorized to deploy armed forces at his discretion without prior approval of Congress. The intent of this provision is to permit the President to effectively respond as Commander-in-Chief to the most likely and time sensitive situations, yet not give him so much latitude that he can operate contrary to the will of Congress or impinge on its constitutional responsibilities. Discretionary deployments would include the ability (1) to repel an armed attack against the United States, its military forces, embassies and installations located outside the United States; (2) to effect the release of U.S. citizens "from the high seas or foreign territory if the government of a ship's flag or of a territory is unable to provide the requisite standard of protection for Americans required by international law;" and (3) to permit the President to react to U.N. Security Council Resolutions.<sup>63</sup> The first situation should not pose any controversy; the framers of the Constitution understood that the President needed to be able to respond to attack. With appropriate safeguards, the other two authorizations should not be controversial either. Courts and legislation, as mentioned earlier, have already supported the President's right to take measures to protect and rescue U.S. citizens. Rescues do not normally take a great deal of time to accomplish nor is there usually a substantial risk of involving the United States in an extended conflict. A prohibition on taking acts of reprisal, similar to the one in the Hostage Act, could be made part of an authorization for citizen rescue.

The third situation gives the President the ability to rapidly meet United Nations requirements particularly in peace-keeping or humanitarian situations. This provision could constrain the numbers of forces he could use by specifically authorizing the size and type of forces or by requiring the President to negotiate agreements as directed by Section 6 of the United Nations Participation Act.

My proposed resolution will require the President to obtain legislative sanction for any other situation in which he believes the employment of the Armed Forces outside the United States is necessary. Congress then has the opportunity to either declare war or pass legislation authorizing the use of force. Although Presidents will claim that this would interfere with their ability to conduct foreign affairs, this provision will ensure implementation of the framers' intent to give Congress a voice in determining whether the nation should expend its treasure in a foreign adventure. If Presidents regularly consult with Congress on the general direction of foreign policy, then there should normally already be a consensus on a general course of action. Such a requirement also helps ensure that the operation will have the support of the American people and makes the Congress accountable for the decision. Time will not normally be a factor in these situations--the President will already have the authority to act in circumstances when time is essential such as in defense of the United States and protection of U.S. citizens. Critics will claim that such an arrangement coupled with the slow deliberative and factional nature of congressional decision making will be a recipe for stalemate and paralysis that would leave the United States incapable of effective response or leadership. The potential for stalemate is real, yet if Congress truly wants to be an equal partner in the important decision to involve the Armed Forces in a foreign intervention, it must adjust its decision

process to the pace of current events. Congress can act relatively quickly if it desires. Within a week of the time United States forces landed on Grenada, both the House and the Senate had passed resolutions declaring that the War Powers Resolution applied. The potential problem for Congress is that it will have to place itself in the uncomfortable position of making tough and potentially unpopular choices rather than providing leadership by reacting to opinion polls.

Even when the President has the authority to employ forces without prior Congressional sanction, the Resolution would require him to consult with the Congress in every possible instance. The resolution would define "consultation" as asking the advice or opinion of Congress on the merits and alternatives of a given situation. The resolution would require the President to consult, as a minimum, with the leadership of both houses of Congress. When the situation permits, he should also include the chairs and ranking members of the Foreign Relations, Armed Services and Intelligence committees of both houses. The object of consultation is to make sure the President has Congressional input and to build consensus for a particular decision. Consultation does not take decision making authority away from the President, but it helps give the President public legitimacy for his action, and it provides Congress a sense of ownership in the President's decision. Perhaps constitutional scholar Alexander Bickel put it best in advocating the benefits of consultation when he wrote, "There is no assurance of wisdom in Congress, and no such assurance in the presidency, on domestic problems or foreign. The only assurance there is lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent."<sup>64</sup>

Whenever the President does take action as defined by the resolution, he must report to Congress within 48 hours. Reports will note the circumstances for the introduction of Armed Forces, the constitutional or legislative authority under which the introduction took place, and the estimated scope, duration and cost of the hostilities or involvement. The President will report no less than every six months for the duration of the involvement unless asked by Congress for a different frequency of reports. Reports are a mechanism to inform and justify a Presidential action not only to Congress but to the American people. Implicit in the reporting requirement is the understanding that the circumstances that necessitated the initial reports may change and that initial estimates may, in fact, be incorrect and need revising. Reports provide the basis for informed decisions and debate within Congress and the American public. Although the report will not start an automatic clock for the withdrawal of troops, it will require Congress to initiate legislation unless the reported incident has already concluded. The President's failure to report will not relieve Congress from having to act.

The last requirement would be to require the Congress to pass legislation using priority procedures in response to the deployment or employment of the Armed Forces. This legislation would either authorize the President's use of force and provide emergency funding to cover the costs of the military operation or request the President to terminate his action and remove the forces as soon as practicable. Such legislation would be subject to veto which Congress would have the opportunity to override. This requirement serves several purposes. First, it makes Congress accountable by forcing it to come to a decision about the issue. Second, it puts Presidents on notice that they will have to build Congressional support for their actions, particularly if their plans to use the

Armed Forces are controversial. In a sense this levels the playing field. If he knows that the Resolution requires Congress to pass legislation, the President will not be able to act and then blame Congress for endangering the deployed forces should Congress not approve. He would be the one responsible for putting the Armed Forces in a situation without the requisite congressional approval. Third, legislation gives national legitimacy to an operation. Finally, it provides the Armed Forces the resources to conduct the operation without degrading overall operational readiness and provides deployed forces the moral and legal backing they need and deserve.

## **CONCLUSION**

The War Powers Resolution attempted to restore to Congress what it perceived to be its legitimate role in national security decisions involving the use of the Armed Forces. Created and enacted because of congressional unhappiness over the Vietnam War and the ensuing lack of consensus within the government on national security policy, the War Powers Resolution was Congress' reaffirmation of its constitutional power to declare war. Although the sponsors of the Resolution intended that the executive and legislative branches would work together in a spirit of comity, the exact opposite has happened and the War Powers Resolution has more often than not been a source of conflict between both branches as a source of conflict. The Resolution also contains several shortcomings. First, it does not permit the President to use military power in situations in which he has had a historical and unambiguous customary right to do so (e.g., rescue of citizens). Second, the automatic withdrawal requirements place an unacceptable burden on the Armed Forces and unduly restrict Presidential flexibility. Finally, the War Powers

Resolution's provisions for automatic withdrawal should Congress fail to act and the use of a congressional concurrent resolution to force the President to terminate his activities seem to violate the balance of power envisioned by the Constitution. Twenty years of experience under the War Powers Resolution has dramatically highlighted all of these shortcomings. The Resolution has not worked and Congress is no closer to achieving its desire to be an integral part in the decision process than it was in 1973. If Congress truly wants to be an effective partner in any decision to introduce the Armed Forces into hostilities, it must develop along with the President a system that promotes and rewards consultation and cooperation. The resolution I have mentioned above would go a long way in achieving that goal. The United States finds itself today as the preeminent military power. World events will continue to demand a United States' response. If we are as a nation going to project power, that power must start from within. It must come from the power generated by the people and the government of a great nation working together to achieve a common goal. The War Powers Resolution is inadequate to accomplish this task. It is time we scrap the Resolution and adopt a more responsive decision mechanism.

## ENDNOTES

<sup>1</sup> Thomas Jefferson, Letter to James Madison, quoted by Loch K. Johnson, America as a World Power (New York: McGraw-Hill, Inc., 1991), 101.

<sup>2</sup> John C. Culver, "The War Powers Resolution," in The Constitution and National Security, ed. Howard E. Shuman and Walter R. Thomas (Washington, D.C.: National Defense University Press, 1990), 236.

<sup>3</sup> An agreement by Haiti's military junta to peaceably relinquish power permitted President Clinton to cancel the invasion, yet he still dispatched troops to a potentially hostile Haiti to supervise the transfer of power. There was extensive Congressional

opposition to military action and polls indicated that 60 per cent of the American public was opposed to military action in Haiti. Congress, however, neither tried to prevent the military operation nor took a firm position either supporting or condemning it after the military forces began deploying. Carrol J. Doherty, "President, Rebuffing Congress, Prepares to Launch Invasion," Congressional Quarterly Weekly Report September 17, 1994, 2580.

<sup>4</sup> Once again, the recent events in Haiti provide a good example. Congress debated the operation but did not pass a resolution either supporting or condemning it. The legislation simply required the President to keep the Congress informed on the operation. Carrol J. Doherty, "President, Rebuffing Congress, Prepares to Launch Invasion," Congressional Quarterly Weekly Report September 17, 1994, 2580.

<sup>5</sup> Robert F. Turner, Repealing the War Powers Resolution (Washington, D.C.: Brassey's (US), Inc., 1991), 33.

<sup>6</sup> Ibid., 34.

<sup>7</sup> Edmund Muskie, "The Reins of Liberty--Congress, the President and American Security," in Foreign Policy and the Constitution, ed. Robert A. Goldwin and Robert A. Licht, (Washington, D.C.: The AEI Press, 1990), 97.

<sup>8</sup> Congress, House, Committee of Foreign Affairs, Markup Before the Committee on Foreign Affairs, House of Representatives, on Grenada War Powers, 98th Cong., 1st Sess., October 27, 1983, 3.

<sup>9</sup> All quoted text in this paragraph are contained in Public Law 93-148, War Powers Resolution contained in United States Code, 93rd Cong., 1st Sess., 1973, Volume 1 (St. Paul, MN: West Publishing Co., 1974) 614-619.

<sup>10</sup> Ann Van Wynen Thomas and A.J. Thomas Jr., The War-Making Powers of the President (Dallas: SMU Press, 1982), 130.

<sup>11</sup> Gordon L. Crovitz, "Micromanaging Foreign Policy," The Public Interest Summer 1990: 107.

<sup>12</sup> Jean Edward Smith, The Constitution and American Foreign Policy (St. Paul, MN: West Publishing Company, 1989), 51.

<sup>13</sup> Ibid., 52.

<sup>14</sup> George C. Edwards, "Can the President Lead?" in The Constitution and National Security, ed. Howard E. Shuman and Walter R. Thomas (Washington, D.C.: National Defense University Press, 1990), 136.

<sup>15</sup> Louis Fisher, "The Legitimacy of the Congressional National Security Role," in The Constitution and National Security, ed. Howard E. Shuman and Walter R. Thomas (Washington, D.C.: National Defense University Press, 1990), 247.

<sup>16</sup> Quoted by Louis Fisher, "Historical Survey of the War Powers and Use of Force," in The U.S. Constitution and the Power to Go to War, ed. Gary M. Stern and Morton H. Halperin (Westport, CT: Greenwood Press, 1994), 13.

<sup>17</sup> "Less than 10 per cent of the international conflicts between 1700 and 1870 were accompanied by formal declarations of war." Cited by Robert F. Turner, The War Powers Resolution: Its Implementation in Theory and Practice (Philadelphia: Foreign Policy Research Institute, 1983), 16.

<sup>18</sup> Johnson, 271.

<sup>19</sup> Louis Fisher, "Historical Survey," in The U.S. Constitution and the Power to Go to War, 14-15.

<sup>20</sup> Johnson, 271.

<sup>21</sup> Francis D. Workmuth and Edwin B. Firmage, To Chain the Dog of War (Dallas: Southern Methodist University Press, 1986), 9.

<sup>22</sup> Alexander Hamilton, James Madison, and John Jay, The Federalist Papers, ed. Clinton Rossiter (New York: NAL Penguin Inc., 1961), 427-428.

<sup>23</sup> Ibid., 424.

<sup>24</sup> Hamilton, The Federalist Papers, 447.

<sup>25</sup> Quincy Wright as quoted by Robert Turner, Repealing the War Powers Resolution, 82.

<sup>26</sup> Fisher, "Historical Survey," in The U.S. Constitution and the Power to Go to War, 17.

<sup>27</sup> These incidents include operations in engagements with Libyan planes in the Gulf of Sidra; engagements with Iranian mine layers and airplanes in the Arabian Sea; and retaliating for attacks on U.S. vessels.

<sup>28</sup> Peter Raven-Hansen, "Constitutional Constraints: The War Clause," in The U.S. Constitution and the Power to Go to War ed. Gary M. Stern and Morton H. Halperin (Westport, CT: Greenwood Press, 1994), 37.

<sup>29</sup> Raven-Hansen, 38.

<sup>30</sup> Raven-Hansen, 38.

<sup>31</sup> Raven-Hansen, 39

<sup>32</sup> Workmuth, 143.

<sup>33</sup> Michael J. Glennon, "Glennon, United States Mutual Security Treaties: The Commitment Myth," in Foreign Relations and National Security Law, (St. Paul, MN: West Publishing Co., 1987), 534.



<sup>34</sup> Congressional legislation implementing these treaties normally interpreted "constitutional process" to mean that Congress would be involved in deciding if and when to respond to an attack on another country.

<sup>35</sup> Jarat Chopra, "From Fig Leaf to the Olive Branch," in The Brown Journal of World Affairs, 1 (Winter 1993-1994): 16.

<sup>36</sup> Ellen C. Collier, The War Powers Resolution: Twenty Years of Experience (Washington, D.C.: Library of Congress, Congressional Research Service Report, 1994), 26.

<sup>37</sup> Congress authorized in Section 7 of the United Nations Participation Act up to 1000 personnel to serve in a noncombatant capacity in peacekeeping functions; however, all of these situations involved far more personnel and all with the exception of the initial operation in Somalia had the potential for, if not expectation of, combatant operations.

<sup>38</sup> Workmuth, 181.

<sup>39</sup> John Sullivan, The War Powers Resolution (Washington, D.C.: U.S. Government Printing Office, 1982), 29-30.

<sup>40</sup> Ibid., 65.

<sup>41</sup> Arthur Bestor, "'Advice' From the Very Beginning, 'Consent' When the End is Achieved," in Foreign Affairs and the U.S. Constitution, ed. Louis Henkin, Michael J. Glennon, and William D. Rogers (Ardsley-on-Hudson, NY: Transnational Publishers, Inc., 1990), 13.

<sup>42</sup> Cited by Turner, The War Powers Resolution: Its Implementation in Theory and Practice, 12.

<sup>43</sup> Turner, Repealing the War Powers Resolution, 112.

<sup>44</sup> U.S. Congress. House Report 93-287, 6, cited by Collier, The War Powers Resolution: Twenty Years of Experience, 4.

<sup>45</sup> Collier, The War Powers Resolution, 51.

<sup>46</sup> P.X. Kelley and Robert F. Turner, "Out of Harm's Way," Washington Post, October 23, 1994, C2.

<sup>47</sup> Quoted by Turner, Repealing the War Powers Resolution, 84.

<sup>48</sup> It should be noted that the time available in this instance was less than the 30 days Congress allows itself under Section 6 of the War Powers Resolution for passing a joint resolution or bill. Nevertheless, Congress did not adequately respond even though there was 1) a sense of urgency because the evacuation was expected to occur and the President needed the authority to act; and 2) a motive because private American citizens' lives were at stake.

<sup>49</sup> Quoted by Turner, The War Powers Resolution: Its Implementation in Theory and Practice, 13.

<sup>50</sup> Quoted by Thomas, The War-Making Powers of the President, 128.

<sup>51</sup> See Justice White's dissent in *INS v. Chadha* for an interesting discussion on the background of the concurrent veto. 462 U.S. 919 (1983).

<sup>52</sup> C. Herman Pritchett, "National Security and the United States Judiciary," in The Constitution and National Security, ed. Howard E. Shuman and Walter R. Thomas (Washington, D.C.: National Defense University Press, 1990), 328.

<sup>53</sup> Thomas, 135.

<sup>54</sup> Public Law 94-239, signed June 30, 1976 quoted by Ellen C. Collier in The War Powers Resolution: Presidential Compliance (Washington, D.C.: Library of Congress, Congressional Research Service Report, 1989), 11.

<sup>55</sup> Turner, The War Powers Resolution: Its Implementation in Theory and Practice, 10.

<sup>56</sup> Turner, Repealing the War Powers Resolution, xv.

<sup>57</sup> Turner, Repealing the War Powers Resolution, 123-124.

<sup>58</sup> P.X. Kelley and Robert F. Turner, "Out of Harm's Way," C2.

<sup>59</sup> Stephen Chapman, Chicago Tribune, September 28, 1992, quoted by Turner, The War Powers Resolution: Its Implementation in Theory and Practice, 125.

<sup>60</sup> Sullivan, 198.

<sup>61</sup> Philip R. Trimble, "The President's Foreign Affairs Power," in Foreign Affairs and the U.S. Constitution, ed. Louis Henkin, Michael J. Glennon, and William D. Rogers (Ardsley-on-Hudson, NY: Transnational Publishers, Inc., 1990), 40.

<sup>62</sup> Turner, The War Powers Resolution: Its Implementation in Theory and Practice, 117.

<sup>63</sup> Thomas M. Franck, "Rethinking War Powers: By Law or By 'Thaumaturgic Invocation'?" in Foreign Affairs and the U.S. Constitution, ed. Louis Henkin, Michael J. Glennon, and William D. Rogers (Ardsley-on-Hudson, NY: Transnational Publishers, Inc., 1990), 62.

<sup>64</sup> Quoted by John C. Culver, "The War Powers Resolution," in The Constitution and National Security, ed. Howard E. Shuman and Walter R. Thomas (Washington, D.C.: National Defense University Press, 1990), 241.

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